

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

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DONNA K. SOUTTER, :  
on behalf of herself and :  
those similarly situated, :  
 :  
Plaintiffs, :  
v : Civil Action  
 : No. 3:10CV107  
EQUIFAX INFORMATION SERVICES, :  
 : May 4, 2011  
Defendant. :  
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COMPLETE TRANSCRIPT OF CONFERENCE CALL  
BEFORE THE HONORABLE ROBERT E. PAYNE  
UNITED STATES DISTRICT JUDGE

APPEARANCES: (All via telephone)

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1           (The conference call in this matter  
2 commenced at 1:34 p.m.)

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4           THE COURT: Hello. This is Soutter against  
5 Equifax, No. 3:10CV107. Who's here for whom starting  
6 with counsel for the plaintiff?

7           MR. BENNETT: Your Honor, this is Leonard  
8 Bennett for the plaintiff. Also on the line are my  
9 cocounsel, Dale Pittman and Matthew Erausquin.

10          MR. GOHEEN: Your Honor, Barry Goheen and  
11 Tony Love for Equifax. Also John Montgomery on the  
12 phone for Equifax.

13          THE COURT: All right. This is a status  
14 conference to consider how we're going to proceed  
15 henceforth in this matter, the case having been  
16 certified.

17          I have received suggestions from each side.  
18 The plaintiff's suggestions, proposed schedule and  
19 procedures for class notification, for completing  
20 discovery, and to set a trial date is Docket No. 94.  
21 And the defendant's objections and its own  
22 suggestions, alternatively, is Docket No. 95, and I  
23 have read that as well.

24          And then the plaintiff has set forth another  
25 one, docket No. 100. What's this all about,

1 Mr. Bennett? I've got one from Mr. Goheen. It's  
2 Docket No. 95, and it's April the 11th. And I've got  
3 one from Mr. Goheen, Docket No. 98, and it's dated May  
4 the 3rd, which is yesterday. Then one from you dated  
5 May the 3rd.

6 Are these, No. 98 and No. 100, the final  
7 proposed versions of these things? Is that what we  
8 have here?

9 MR. BENNETT: That's correct, Judge. And in  
10 the interim, the Court will recall, the original order  
11 had set a deadline of April 11 to file the parties'  
12 position.

13 During that interim, we were already  
14 certainly engaged with defense counsel, not  
15 adversarially, that is we were attempting to meet and  
16 confer properly between the two parties but had not  
17 succeeded or determined whether that would be  
18 possible, whether an agreed outcome would be possible,  
19 and subsequent to that we continued that process with  
20 the defendant having informed us off docket of their  
21 respective positions, our side having done the same.

22 After really the last person to person or  
23 telephonic meet-and-confer call there were significant  
24 differences that are fleshed out in respective  
25 filings. The defendant filed -- really the last two

1 filings crossed paths, so they are not directly  
2 responsive to one another. But Equifax filed its  
3 opposition to our proposal. We in our more recent  
4 filing adapted it to accommodate a couple of the  
5 matters that they had raised and to attach the notice  
6 that we had sent them at the end of last week.

7 The defendant has also communicated this  
8 morning some additional concerns to us that had not  
9 been incorporated within either parties respective  
10 positions to the Court.

11 MR. GOHEEN: Your Honor, this is Barry  
12 Goheen. Just to follow-up. I think Mr. Bennett has  
13 set it forth accurately. If I would just kind of  
14 flesh out just a tad. I think the filings Your Honor  
15 mentioned a few moments ago that were dated in April  
16 were, for lack of a better term, I guess one might  
17 call them conditional. The status conference was  
18 continued until today. I think it was April 13, and I  
19 think that was because of maybe conflicts we had, and  
20 we certainly appreciate the Court's indulgence in  
21 that, but I think we were, both sides, both  
22 plaintiffs' counsel, Mr. Bennett and his team, and our  
23 team for Equifax, had filed what we filed, as  
24 Mr. Bennett said, in seeking to comply with the  
25 Court's original order in advance of that April 13

1 date. Once the continuance of this conference was  
2 made official and sent through, we then, and  
3 Mr. Bennett did point out and he's right, we met and  
4 conferred, and not surprisingly there were some things  
5 we agreed on and some things we had differences on,  
6 but I would suggest yesterday's filings, which he's  
7 right, pretty much crossed paths or pretty much came  
8 one after another on the filings, do reflect the  
9 latest and probably, I would say at least from  
10 Equifax's point of view, the operative proposed plan  
11 from our side anyway, Your Honor.

12 THE COURT: All right.

13 Well, I've read all four of them. I just  
14 wanted to make sure. It looked to me like you-all  
15 weren't really very far apart from what you filed in  
16 April in how to proceed and on what timetable to  
17 proceed.

18 MR. GOHEEN: I do think, Your Honor -- this  
19 is Barry Goheen again for Equifax. I do think there  
20 are some agreements. I think we've had some  
21 productive communications.

22 I believe that the parties are in agreement  
23 on the length of the discovery, if you will, the  
24 discovery period, as well as the post dispositive  
25 motions schedule following that, and I think that's

1 where we do have some common ground.

2 And I think that we're on other issues. And  
3 notice, for example, there are some things that we,  
4 again, agree with on the proposed notice. There are  
5 others that we communicated to Mr. Bennett some kind  
6 of larger areas of agreement without getting into  
7 flyspecking the line item thing, but I do believe we  
8 have found some common ground.

9 THE COURT: I don't have a notice here. Have  
10 you all actually given a notice in here that I don't  
11 have?

12 MR. BENNETT: The plaintiff has proposed one  
13 that's attached to Docket No. 100, Your Honor.

14 THE COURT: But that's not the one -- you  
15 don't agree on it?

16 MR. BENNETT: No, sir.

17 MR. GOHEEN: Right. This is Barry Goheen.  
18 Your Honor. This is something Mr. Bennett proposed in  
19 his filing of yesterday was that he did send that as  
20 pointed out on last Friday afternoon, which is  
21 April 29, and proposed for Equifax to respond in one  
22 week, and then assuming the parties cannot work out  
23 their differences to meet and confer, and then submit  
24 their proposals to the Court. I believe it says May 9  
25 here.

1           We believe it can be a little bit longer than  
2   that to respond. But in any event, that's the reason  
3   there's been one submitted and only one proposal  
4   submitted to the Court.

5           MR. BENNETT: Your Honor, this is  
6   Mr. Bennett. If the Court would accommodate this, I  
7   believe I could -- there are really three disputes  
8   that appear to be causing the greatest difficulty  
9   between the parties, and a number of the matters, the  
10   process matters, the scheduling, the length of time  
11   for preparation and those types of matters, we have  
12   worked or will be able to work out, but the three  
13   matters that seem to be causing the great difficulty,  
14   I think, are as follows:

15           The first is that there is a different  
16   opinion between the parties that's actually reflected  
17   in the appellate briefing about what your order and  
18   memo and class definition mean.

19           THE COURT: I haven't read your appellate --  
20   I've got a copy of it, but I haven't read it.

21           MR. BENNETT: Yes, Your Honor. If I could  
22   summarize. One of the arguments, if the Court recalls  
23   the class certification argument in the briefing  
24   before the district court, there's a question of how  
25   you accommodate the individuals that want to or



1 believe that they could prove causation significant  
2 actual damages.

3 And we advocated, and I believed, as our --  
4 we had an alternate position, which we abandoned, and  
5 at the hearing advocated that if you have actual  
6 damages, your remedy is to opt out of the class. And  
7 that is reflected. The Court so ruled. And that is  
8 reflected in the Court's memorandum.

9 The order doesn't contain the explanation  
10 that this court included within the memorandum. And,  
11 thus, the defendant has taken the position that what  
12 your order means is that class members will have to  
13 make an individualized election as to whether or not  
14 they have actual damages over a thousand dollars and  
15 that that election based on the way your order is  
16 drafted could occur at any time including after  
17 judgment, after trial.

18 We have taken the position that what your  
19 order, the way that this court interpreted that order,  
20 as outlined in the memorandum, is that by not opting  
21 out they have -- the class member has elected not to  
22 pursue those damages greater than \$1,000.

23 And, again, you haven't read the appellate  
24 briefing, but that's one of the four arguments that  
25 are at issue is this different opinion as to what this

1 court -- what the Court's order meant. Our side  
2 arguing that it means that if you do not opt out, you  
3 have elected not to pursue actual damages greater than  
4 \$1,000, and the defendant arguing that there is this  
5 separate stage that this court contemplated where at  
6 some point later, and it argued at some undeterminable  
7 time, it could be even at the end of the case, the  
8 class member could elect to -- could assert that it  
9 has damages greater than \$1,000. And this becomes  
10 difficult because in the meet-and-confer process, the  
11 class notice, the defendant has taken the position  
12 that our class notice needs to incorporate a separate  
13 non-opt out related process for the, as it calls, self  
14 election for actual damages.

15 And we very much disagreed that that's what  
16 this Court's order says, but, of course, I'm the  
17 plaintiff, and they're the defendant, and Your Honor  
18 is the Court.

19 The second issue, if the Court please, is --  
20 THE COURT: Well, the order doesn't say  
21 anything about opting out one way or the other.

22 MR. BENNETT: No, sir.

23 THE COURT: That's because you-all need to  
24 put all that in the notice.

25 MR. BENNETT: Yes, sir, but the question is,

1 do we also, in addition to the opting out, does the  
2 Court contemplate that there would be really a  
3 separate independent procedure, separate and apart  
4 from the opt out, where class members would prove  
5 their actual damages for class membership.

6 We believe this is a tactical misread of the  
7 Court's order. The defendant's position has remained  
8 that the class can't be identifiable on appeal, so  
9 they are taking the position now similarly that this  
10 Court's order contemplated a procedure separate and  
11 apart from the opt out procedure whereby a  
12 determination would be made as to class membership  
13 based on actual damages. And our belief is, our  
14 interpretation of the order, is that, and informed by  
15 the memorandum, is that when a class member stays in  
16 the class, it does not opt out. They have made that  
17 election. They stay in the class. They cannot get  
18 actual damages greater than \$1,000. And if they opt  
19 out, they can do whatever they choose.

20 THE COURT: Mr. Goheen.

21 MR. GOHEEN: Your Honor, obviously, I don't  
22 think the Court would want to hear me argue on class  
23 cert, but to respond to that briefly, I don't think  
24 there's quite as big a disagreement on that as I was  
25 hearing from Mr. Bennett.

1           The issue, and it sounds like he's limiting  
2     that to just the draft notice, and we did raise that  
3     issue in our comments on his notice, and we  
4     communicated with him already, but the Court's order,  
5     I'm looking at it right now, and this is the order,  
6     not the memorandum, and I'm not going to get into the  
7     whole class definition because it is a little lengthy,  
8     but it does say which persons suffered actual damages  
9     of less than \$1,000 as a result of a report by Equifax  
10    that did not accurately report that the judgment had  
11    been satisfied, appealed or vacated.

12           The issue is in the notice that needs to be  
13    in the notice. I don't see that there is any -- that  
14    there is any reference to that in the notice. It  
15    seems to me that a fundamental part of a class notice  
16    is to provide the class definition, whatever it is,  
17    and that is not in the notice.

18           So whether we get into positions on they need  
19    to prove them or it's a fluid thing that we had in our  
20    brief, and so forth and so on, regardless of  
21    whatever is in the 23(f) petition, they get a point  
22    for notice, which is what we're talking about right  
23    now is that that needs to be disclosed to class  
24    members.

25           If a class member believes the person has

1 actual damages, to quote the order, actual damages of  
2 less than \$1,000 as a result of a report by Equifax  
3 that did not accurately report that the judgment had  
4 been disposed of, then that person is in the class.

5 If a consumer has belief he or she has actual  
6 damages of more than \$1,000, my reading anyway, that  
7 person is not in the class. And I just think the  
8 notice would want to reflect that.

9 THE COURT: Mr. Bennett, what are you talking  
10 about doing in this case for people who suffered  
11 actual damages of less than \$1,000? What happens if a  
12 person says that?

13 MR. BENNETT: I'm sorry. Are you asking the  
14 plaintiff?

15 THE COURT: Yes, you, Mr. Bennett.

16 MR. BENNETT: Judge, if they opt out, then  
17 they cannot pursue --

18 THE COURT: That's not the question. The  
19 question is what about people who don't opt out and  
20 say they have damages between 0 and \$1,000 actual  
21 damages?

22 MR. BENNETT: Judge, we don't contemplate and  
23 did not read your memo and your order to seek an  
24 election of individuals to make a statement to us or  
25 to the Court that they -- as to what their actual

1 damages are. We're seeking statutory damage remedy.

2 THE COURT: I didn't ask you that. What I  
3 asked you is what do you propose to do about these  
4 actual damages of less than \$1,000?

5 MR. BENNETT: We don't propose to do  
6 anything, Judge. We propose to seek statutory  
7 damages.

8 THE COURT: The purpose of your suggestion  
9 about suffering actual damages of less than \$1,000 as  
10 a limit was what?

11 MR. BENNETT: Because statutory damages at  
12 that point, Judge, are offered within the statute as a  
13 proxy or as an alternative to those actual damages.  
14 If the defendant concedes, that is the purpose of the  
15 statutory damage remedy is that it is an alternative  
16 remedy when actual damages are below \$1,000.

17 THE COURT: So why do we need that language  
18 in the class definition at all?

19 MR. BENNETT: I don't believe we need it in  
20 the class definition, Judge, but to the extent that it  
21 was included within the class definition, we believe  
22 that Your Honor informed the parties in the memorandum  
23 that the election to stay in the class meant that they  
24 were not going to be able to pursue their actual  
25 damages.

1 THE COURT: Are you of the view that that  
2 language ought to not be in the class certification  
3 language?

4 MR. BENNETT: Well --

5 THE COURT: Which person suffered actual  
6 damages of less than \$1,000?

7 MR. BENNETT: I believe, Judge, it's  
8 unnecessary. I don't believe it's incorrect.

9 THE COURT: I thought we got it from you. I  
10 thought that language came from you in your briefs.

11 MR. BENNETT: Judge, it --

12 THE COURT: Yeah, it did, didn't it?

13 MR. BENNETT: Well, we offered a second  
14 alternative, Judge.

15 THE COURT: Why do you keep doing that? Why  
16 don't you just do the right thing and quit creating  
17 problems of alternatives. Why don't we just take that  
18 language out of there? What does that do in the case?

19 MR. BENNETT: It doesn't do anything in the  
20 case, Judge.

21 THE COURT: Mr. Goheen?

22 MR. GOHEEN: I think that came from their  
23 briefs. We certainly have argued that, and I don't  
24 believe it does anything. That's Your Honor's  
25 question, so I think it does seem to be an

1     appendage -- an unnecessary appendage, excuse me.

2             THE COURT:   Why don't I do an order amending  
3     the class definition to take out "which" and see how  
4     it would read then?   It would just be a period after  
5     unpaid; is that right?

6             MR. BENNETT:   Yes, Your Honor.

7             THE COURT:   Is that what you're saying,  
8     Mr. Goheen?

9             MR. GOHEEN:   I'm reading it as well, Your  
10    Honor.

11            THE COURT:   All right.   Well, take a minute  
12    and read it.

13            MR. GOHEEN:   As I understand it, Your Honor,  
14    maybe Mr. Bennett is better to respond to this, we  
15    take that out, so the definition is going to include,  
16    and, again, I'm not going to read it all, but it will  
17    close with "At a time when any Virginia General  
18    District Court or Circuit Court judgment" --

19            THE COURT:   Slow down, Mr. Goheen.   Start all  
20    over.   You're going too fast.

21            MR. GOHEEN:   I'm sorry.   I apologize.   I was.  
22    It was a problem I had in the hearing, as I recall.  
23    I'll just read the whole thing up to the period.   This  
24    is off the order.   "All natural persons for whom  
25    Equifax's records note that a credit report was



1 furnished to a third party who requested the credit  
2 report in connection with an application for credit on  
3 or after February 17, 2008, to February 17, 2010,  
4 other than for an employment purpose at a time when  
5 any Virginia General District Court or Circuit Court  
6 judgment that had been satisfied, appealed or vacated  
7 in the court file more than 30 days earlier was  
8 reported in Equifax's file as remaining unpaid,"  
9 period.

10 THE COURT: Is that what you think needs to  
11 be done, Mr. Bennett?

12 MR. BENNETT: Yes, Your Honor, and --

13 THE COURT: Now, wait. Don't talk. Every  
14 time you say something, it gets more convoluted.

15 Mr. Goheen, is that what you think needs to  
16 be done?

17 MR. GOHEEN: I believe that it does cure one  
18 of the issues that is we had, yes. I think that was  
19 one of the things we argued was the point Mr. Bennett  
20 was raising, which was how do we know someone has less  
21 than or more than \$1,000. That's a  
22 self-identification point, I guess, for lack of a  
23 better term.

24 THE COURT: I'm kind of inclined to believe  
25 that I was trying to solve the problem that you raised

1 by taking the solution that Mr. Bennett suggested and  
2 it may have created more problems than it solved  
3 actually, I guess, but the notice would clearly have  
4 to say also that you're not pursuing actual damages,  
5 isn't that right, Mr. Bennett?

6 MR. BENNETT: Yes, sir, it would have to say  
7 that.

8 THE COURT: Yes.

9 MR. GOHEEN: I think that was to go back to  
10 where this part of the discussion started, Your Honor.  
11 I think that was our point, that the draft didn't.  
12 Maybe it did.

13 THE COURT: It doesn't make any difference.  
14 That was the point you were saying it needed to deal  
15 with. All right.

16 All right. I think that after talking with  
17 you-all the right thing to do is to amend the class  
18 certification notice to put a period after the word  
19 "unpaid" in that paragraph and delete the language  
20 "which person suffered actual damages of less than  
21 \$1,000 as a result of a report by Equifax that did not  
22 accurately report that the judgment had been  
23 satisfied, appealed or vacated," period. And that  
24 would come out.

25 Since I haven't read the appeal papers, I

1 have no idea what that does to your appeal, but I'm  
2 sure you can straighten that out in your subsequent  
3 briefing with the Court of Appeals.

4 MR. BENNETT: Yes, sir.

5 THE COURT: And then if they don't like what  
6 was done, they will at least know that maybe there  
7 isn't this issue involved or whatever it is that  
8 you-all conclude that comes from that. But for our  
9 purposes, I think that's the solution, and that's what  
10 I will do. And I'll just simply report having  
11 conferred with counsel and concluding on the basis of  
12 their views that it's proper so to do, that order is  
13 amended to read, and just retype the whole order with  
14 that out of there. Okay? Or the class notice, class  
15 definition would read that way.

16 I do think it needs to be in the notice that  
17 people are not going to be getting any actual damages  
18 if they think they had actual damages.

19 All right? Now, let's move on.

20 MR. BENNETT: Yes, sir. The second issue  
21 regards the timing of both the start of discovery and  
22 of the class notice or a list generation process.  
23 Both discovery and the class list generation process  
24 will take some time, and the plaintiffs' view is that  
25 the parties need to start that right away.

1           The defendant holds the view that it would  
2     like either an actual or de facto stay of anything in  
3     this case until after a disposition of the Rule 23(f)  
4     appeal that it has lodged in the Fourth Circuit.

5           THE COURT:   When is your brief due on that?

6           MR. BENNETT:   It's already briefed, Judge,  
7     and, historically, the last two times Equifax filed a  
8     23(f), they were denied within about a two- to  
9     three-month window of time.   Similarly in our *Williams*  
10    case.

11          THE COURT:   Well, the problem I have is that  
12    the timing that you're dealing with now has the Court  
13    basically gone after this month.   They don't sit  
14    anymore after this month until September.

15          MR. GOHEEN:   Your Honor, this is Mr. Goheen  
16    for Equifax, if I may.   This is the exact timing on  
17    that.   The petition was filed on behalf of Equifax on  
18    April 13, 2011.   Plaintiff, through its counsel here  
19    on the call, responded or filed the response to the  
20    petition on April 27.   So I think that was last week.  
21    So it is now pending as Mr. Bennett just said.

22          THE COURT:   Have you filed a reply?

23          MR. GOHEEN:   There is not a provision for a  
24    reply, and no, we're not --

25          THE COURT:   There is a provision for a reply

1 if they ask you for it, isn't it?

2 MR. GOHEEN: I believe that would be the only  
3 basis, Your Honor, and that has not been requested by  
4 the Court at least as of the present time.

5 THE COURT: Okay.

6 MR. GOHEEN: So if it turns out that the  
7 Court is not in session through or, I'm sorry, after  
8 May, that was news to me, obviously I'd defer to the  
9 Court's experience, of course, on that, and I was  
10 unaware of that, but that is the issue, and to  
11 follow-up on --

12 THE COURT: Mr. Goheen, their last argument  
13 session is May 10 through 13, and then it resumes  
14 again September 20 through 23.

15 MR. GOHEEN: Okay. Thank you, Your Honor.

16 THE COURT: Let me see. I'm going to the  
17 docket to see if there's anything on the docket about  
18 this issue. There wasn't when I looked at it before,  
19 but I looked at it -- I think I would have noticed it,  
20 but I wasn't looking for this.

21 MR. GOHEEN: What I've been advised is that  
22 it seems consistent, I think, with what Mr. Bennett  
23 maybe just said is that the Fourth Circuit's history  
24 is that it tends to be rather prompt, but usually  
25 within the 30 to 60-day time frame that it will

1 dispose of 23(f) petitions for the very reason we're  
2 having this discussion right now. If the case  
3 continues to end in the District Court and whether  
4 proceedings are stayed or partial or no stay, the  
5 bottom line is it's difficult to manage two courts.  
6 So I think that's part of what we've tried to set  
7 forth in our papers that we submitted yesterday.

8 The other issue is, and this probably is  
9 something Mr. Bennett was getting to perhaps on his  
10 third issue, is that this is going to be in addition  
11 to a rather time consuming process, particularly with  
12 regards to class list, which he just mentioned. It's  
13 also going to be rather intensive.

14 THE COURT: Mr. Goheen, we are losing a lot  
15 of your communication. You're sort of breaking off at  
16 the end of some words, and I don't know what it is,  
17 but it's hard for me to hear, and I'm sure it's hard  
18 for the court reporter. Are you on a squawk box?

19 MR. GOHEEN: I apologize. I took the  
20 handset. Does that sound better?

21 THE COURT: Yes, it does.

22 MR. GOHEEN: Okay. Thank you, Your Honor.  
23 I'm on the handset because Mr. Love and I are in a  
24 conference room. That's why we were on the speaker  
25 phone, but I'll pick up that handset.

1 THE COURT: Well, you are still crackling  
2 some.

3 MR. GOHEEN: I'm going to do the best that I  
4 can, Your Honor.

5 THE COURT: Okay.

6 MR. GOHEEN: I'll try to speak a little more  
7 loudly.

8 (Unintelligible) for preparing or generating,  
9 compiling, if you will, the class list is going to be  
10 a rather lengthy process, as Mr. Bennett just  
11 suggested, in terms of time, but it's also going to be  
12 fairly expensive, and we're not talking about millions  
13 of dollars, but we are talking about pretty  
14 substantial costs, and I think there's going to be  
15 disagreement on who bears those costs. But that issue  
16 aside for the moment, it is rather expensive, and we  
17 believe that that would also -- at least counsel --  
18 and I'm waiting to us see what the Fourth Circuit is  
19 going to do or at least giving the Fourth Circuit a  
20 little time, say, until maybe the end of May, if  
21 that's when the Court is going to break for an  
22 extended period to see what the Fourth Circuit does.

23 Obviously (unintelligible.)

24 THE COURT: We're losing you. I don't know  
25 what it is. For instance, when you say "process," we

1 lose everything. When you say "deny," as I think  
2 that's what you were saying, we lost everything but  
3 the D sound. I don't know what's happening.

4 MR. GOHEEN: I'm having difficulty hearing  
5 the Court as well.

6 THE COURT: You are? How did this call get  
7 going?

8 MR. BENNETT: Your Honor, this is a private  
9 conference call bridge, and the parties have called  
10 into it, and we have three-wayed Your Honor in.

11 THE COURT: Why don't you get them back on  
12 the line and start again? If he's having trouble  
13 hearing me and I'm having trouble hearing him, we've  
14 got a problem.

15 MR. BENNETT: Yes, Your Honor. We can either  
16 call you back or I'd suggest maybe Mr. Goheen calls  
17 in. You know, hangs up and calls into the --

18 THE COURT: Would you try that, Mr. Goheen,  
19 because I think you need to hear what I'm saying as  
20 well as I need to hear what you're saying?

21 MR. GOHEEN: Okay. What are you suggesting?

22 THE COURT: I think Mr. Bennett says you hang  
23 up and dial back in.

24 MR. BENNETT: Yes, that's what I'm  
25 suggesting.



1 MR. GOHEEN: All right. We'll try that and  
2 come right back.

3 THE COURT: All right. Let's see what  
4 happens.

5 MR. MONTGOMERY: Mr. Goheen, if you could do  
6 it from another line, perhaps it might be helpful. It  
7 seems like it might be your phone that you're using.

8 MR. GOHEEN: Okay. That's a good idea, John.  
9 We'll try that.

10 THE COURT: Hello.

11 MR. GOHEEN: Hello.

12 THE COURT: Is this Mr. Goheen?

13 MR. GOHEEN: Yes, Your Honor. Better?

14 THE COURT: No, not really. Talk a little  
15 bit and let's see. Recite the Declaration of  
16 Independence or something.

17 MR. GOHEEN: I was going to say, Your Honor,  
18 that I went to the Final Four, and I was pretty  
19 freaking disappointed in Kentucky.

20 THE COURT: Well, I was, too. We're still  
21 having some of the same problem, I think.

22 MR. GOHEEN: Well --

23 THE COURT: Are you having the same problem  
24 with me?

25 MR. GOHEEN: Yes, Your Honor, and when Mr.

1 Bennett was talking right before I disconnected a few  
2 minutes ago, he was going in and out as well.

3 THE COURT: I don't know who it is, but I've  
4 had calls on this telephone today and I haven't had  
5 the problem. So, Mr. Bennett, get hold of your  
6 facility. We'll all hang up and you get us back in.

7 MR. BENNETT: Yes, sir.

8 THE COURT: Thank you.

9 MR. BENNETT: Thank you.

10 (Brief recess taken.)

11 THE COURT: Hello.

12 MR. GOHEEN: Judge, this is Barry Goheen.

13 Does that sound any better?

14 THE COURT: That's a whole lot better for me.  
15 How about for you?

16 MR. GOHEEN: Better on our end, and I  
17 understand from Mr. Bennett and the other participants  
18 telephonically it's better for them as well.

19 THE COURT: All right. Good.

20 MR. GOHEEN: I apologize for that, Your  
21 Honor. I want to, obviously, go back through what the  
22 Court was having difficulty hearing.

23 THE COURT: I think we've got most of it.  
24 The bottom line is that we don't know when the Fourth  
25 Circuit is going to act, but they generally try on

1 these to act fairly quickly on these matters when they  
2 are briefed. They send them to a panel. And it may  
3 be that next week when they're here they'll kind of  
4 confer over it and decide it next week.

5 MR. GOHEEN: Based on -- this is Barry Goheen  
6 again. Based on what Your Honor said with regard to  
7 the schedule, I would be extremely surprised if the  
8 Court in going into some sort of a break after this  
9 month or after some point this month that the petition  
10 would not be ruled upon one way or another by the time  
11 the Court broke for the reasons that we've just been  
12 discussing.

13 THE COURT: They also, though, Mr. Goheen,  
14 it's not unusual that these panels will adjourn  
15 without making decisions, not just these, but on any  
16 interim matter, and they'll continue to focus on them  
17 whether the court has sessions or not. They don't  
18 just take off and stop work, although some of them,  
19 the judges take off, but I think this court is pretty  
20 careful about trying to manage its docket and handle  
21 things as expeditiously as they can.

22 So I don't think that's a problem. We're not  
23 looking at a forever time frame. That's for sure.

24 MR. GOHEEN: Correct, Your Honor.

25 THE COURT: But on the other hand, I'm

1 concerned about delay, and I don't know why we can't  
2 get started with the case, and then if the Court  
3 grants the appeal, I think it's appropriate to stop  
4 the case, but you need to get going with the class  
5 list.

6 How are you going to get the class list?

7 MR. BENNETT: Judge, this was the third  
8 issue. The proposal we have for the class list is the  
9 plaintiff will hire a company called Rust, which was  
10 actually the administrator that was used in the  
11 *Williams v. LexisNexis* case. There are a number of  
12 others approved in the Eastern District of Virginia,  
13 but it's seen as the gold standard of administration  
14 companies. It costs a little bit more, but they have  
15 significant experience in actually putting together  
16 from disparate databases class list information. And  
17 our proposal had been one -- and we offered what we  
18 thought was a cooperative proposal, and Equifax  
19 opposed it, so in our more recent filing we have  
20 offered an alternative that isn't dependent on  
21 Equifax's cooperation.

22 The first suggestion we have, and the purpose  
23 would be to minimize burden on the defendant, would be  
24 that Rust would be retained and paid by the plaintiff  
25 but responsible to the Court, as the notice process

1 is, would meet with a responsible person or person  
2 responsible at Equifax for its archive database and  
3 put together a computer protocol that will minimize  
4 the burden on Equifax while generating an accurate  
5 class list. The defendant opposes providing any  
6 person to interact with Rust.

7 So our alternative, which is supported by the  
8 rules, is that Equifax will provide a mirror  
9 electronic copy of its archive, and Rust will then use  
10 that data to generate the class list.

11 We want to go back to the Virginia Supreme  
12 Court only one time just because we don't want to be  
13 disruptive and overly burden that third party, that  
14 non-party, but that Rust would then have the data from  
15 the two databases and use on a system-wide basis the  
16 extraction and matching system that we believe is very  
17 successful on the sampling basis precertification.

18 To simplify, our position is either the  
19 defendant cooperates and maintains complete ownership  
20 and control over its data, it asserts certainly a  
21 business interest in that control, and we work to  
22 minimize its burden, or alternately if it continues to  
23 oppose and, we think, obstruct, then we don't  
24 necessarily have to have anything to do with the  
25 defendant. It just turns over those searchable

1 archives, and we have Rust do the extraction.

2 Equifax doesn't want to turn over its  
3 database. We understand why. So we have tried to  
4 come up with an alternative that gives its executives  
5 piece of mind knowing that it has maintained full  
6 control over that database. But to the extent that  
7 Equifax begins to, we believe, manufacture or  
8 contrive, and our belief is based on actual discovery,  
9 not just supposition, internal expenses or costs that  
10 it is asserting for extracting or doing searches of  
11 its archive, we believe that the proper way to  
12 generate the list, the least expensive way, and the  
13 way in which the generation --

14 THE COURT: Will you do me a favor, Mr.  
15 Bennett, and quite larding the statement up? Just get  
16 me to the bottom line of what the proposal is without  
17 all the argument, without all the parentheticals.  
18 Just get right to it so I can follow. You all are so  
19 far ahead of me in your knowledge base it's not  
20 helpful to get all these deviations. So give me  
21 exactly what you're saying you want to do.

22 MR. BENNETT: Yes, sir.

23 Either Equifax extracts the archived monthly  
24 files because it maintains a report on every consumer  
25 snapshotted on a monthly basis.

1           THE COURT: That's a lot of parentheses.  
2 Cut it down and tell me exactly what you want done  
3 leaving the parentheses out.

4           MR. BENNETT: I want Equifax, Judge, to  
5 either (A) provide the monthly snapshots for all  
6 consumers with Virginia judgments in them so that Rust  
7 can then overlay them with the Supreme Court data or  
8 (B) I want Equifax to provide to Rust under a  
9 protective order a mirror copy of its full archive  
10 database so that Rust will do the searches and  
11 extraction and generate the list in the same way.

12           THE COURT: All right. Thank you.

13           All right. Mr. Goheen.

14           MR. GOHEEN: Your Honor, this is Mr. Goheen.  
15 Mr. Love will respond to a lot of those details, but  
16 let me quickly just touch on one thing. Mr. Bennett  
17 mentioned if someone within Equifax working with Rust  
18 or whoever the class administrator is, he's correct  
19 that in a prior communication we did resist that. I  
20 did resist that. And we continue to do so to the  
21 extent that it's someone who's devoted, I think we put  
22 this in our papers, too, if someone's, essentially,  
23 nine to five job would be working with Rust, but the  
24 crux of the situation, as I mentioned a moment ago --

25           THE COURT: Mr. Goheen, you are getting down

1 and you're getting Bennettitis.

2 MR. GOHEEN: Oh, no.

3 THE COURT: Yes, you are, and that's a bad  
4 thing for you.

5 Do you want to do the first choice, the  
6 snapshot of the Virginia judgments at X point in time,  
7 whatever we're talking about, or give out all  
8 archives? Which do you want to do?

9 MR. GOHEEN: I'm going to let Mr. Love handle  
10 that, Your Honor.

11 THE COURT: And I want the answer first.

12 MR. LOVE: Equifax is unwilling, and I'll  
13 explain why.

14 THE COURT: I don't need any parentheticals.  
15 You're getting Bennettitis, too. I'll give you a  
16 chance to do that. I need to understand the issues  
17 first, Mr. Love. Which do you want to do of those  
18 two?

19 MR. LOVE: Equifax would not want to do  
20 either of those, Your Honor.

21 THE COURT: Tell me what you want to do  
22 without a bunch of sidebar, and once I get the issues  
23 organized, we can deal with the reasons. What is it  
24 you want to do?

25 MR. LOVE: Equifax has offered to give



1 Plaintiff 24 months of frozen scan data in electronic  
2 format. Equifax has indicated that there is a  
3 substantial cost associated with that, which is in the  
4 hundreds of thousands of dollars. We have conveyed  
5 Equifax's offer to plaintiff.

6 We would have to agree with what the search  
7 criteria were going to be for that 24 months of frozen  
8 scan data. Even if we get past the cost issue, we  
9 would have to agree. For example, Mr. Bennett said  
10 that his wish list A was monthly snapshots of Virginia  
11 consumers with a judgment on their file.

12 Well, when Equifax searches for this type of  
13 information, it has to create a program like a  
14 computer program that searches for certain criteria.  
15 The more criteria you search for and the more nuanced  
16 it becomes, the more expensive it becomes, and the  
17 more time consuming it becomes, and the more complex  
18 it becomes.

19 For example, would we be searching for  
20 consumers who only have a current Virginia address on  
21 file or would we be searching for consumers who ever  
22 had a Virginia address on their file? That is but one  
23 example of what makes this type of search complex.

24 THE COURT: It's the kind of search that  
25 people do all the time all over the world in all kinds

1 of businesses. The question is how do you do it and  
2 how do you do it at the most reasonable cost.

3 MR. LOVE: That's right, Your Honor.

4 THE COURT: This is not the first time this  
5 has come up, and it ain't going to be the last time.  
6 And I have found in the past that sometimes that the  
7 estimates that companies come up with are pretty heavy  
8 in the front end, and when they actually have to get  
9 down to doing it it's not nearly as heavy.

10 MR. LOVE: I thought that would be the case  
11 here to be sure.

12 THE COURT: And I think that the general  
13 tendency that I've experienced in dealing with  
14 electronic discovery in this area and in general is  
15 that the IT people in-house manage to see great  
16 bogeymen in the cost department. So you're bound to  
17 have some experience along that line.

18 So, okay, you want 24-month frozen scan data  
19 in electronic format and agreement on the search  
20 criteria.

21 Mr. Bennett, what do you say about that?

22 MR. BENNETT: Judge, this is the first time  
23 that they have made that offer.

24 THE COURT: I don't need anything.

25 MR. BENNETT: That would be (A), Judge. That

1 is option A. And if that is what they are willing to  
2 do, then that's agreeable to us. We certainly  
3 disagree that there's any out of ordinary expense or  
4 costs, and, again, our disagreement is based on  
5 evidence, not on supposition.

6 THE COURT: All right. Have you all not then  
7 talked about search criteria because it hadn't gotten  
8 to you yet?

9 MR. BENNETT: That's correct, Judge.

10 (Mr. Pittman is joining the conference call.)

11 THE COURT: All right. So you'd have to  
12 define the 24-month period, and that's basically the  
13 class period, isn't it?

14 MR. BENNETT: Yes, sir, that is the class  
15 period.

16 THE COURT: What is the frozen scan data?  
17 What does that mean? One month, one time?

18 MR. BENNETT: Yes, sir. Each month is  
19 archived.

20 THE COURT: So you're doing one for each  
21 month.

22 MR. LOVE: Under an individual consumer's  
23 file at a point in time. Generally once a month.

24 THE COURT: All right. Well, it seems to me  
25 you-all ought to be able to work that out.

1 MR. LOVE: The issues, Your Honor, to  
2 negotiate, and certainly we're willing to continue our  
3 negotiations over the 24 months of scans with  
4 plaintiff, the issues are costs, which we've talked  
5 about, time, even if the search criteria -- even if an  
6 agreement can be reached on search criteria to  
7 generate this data, Equifax estimates that it could  
8 take months to generate this data.

9 So there's the cost, there's the time, and  
10 the search criteria.

11 THE COURT: Okay. Mr. Love, let me tell you,  
12 you go back and talk to your client because that just  
13 doesn't make any sense based on my experience in  
14 presiding over electronic discovery disputes. And  
15 this is again bogeymen coming up out of the ground.  
16 And it can be worked out, but this idea that it's  
17 going to take months is really quite silly.

18 I have found that turning your data over to  
19 professionals results in a whole lot more expeditious  
20 work product in other cases involving this same kind  
21 of information, not necessarily this information. So  
22 I can't buy that it's a many months process. And if  
23 you think that this court is going to wait months,  
24 that's an option that we're not really going to work  
25 on. We're going to find some other way to do it.

1           And I'll be glad to turn it over to somebody,  
2   a third party, and let them do it with your data if  
3   Mr. Bennett pays for it. He's going to have to pay  
4   for it one way or the other anyway.

5           Equifax needs to have a can do attitude  
6   instead of a can't do attitude. That's the basic  
7   problem.

8           MR. LOVE: Your Honor, I understand what the  
9   Court's saying and I'm not going to argue with that.  
10   It's really a technological issue, not a human  
11   resource issue, but I understand what the Court is  
12   saying.

13          THE COURT: I understand what you're talking  
14   about. Technology exists to do this kind of thing.

15          Mr. Bennett, what do you have in the way of  
16   an estimate of time and cost?

17          MR. BENNETT: Well, Judge --

18          THE COURT: If anything.

19          MR. BENNETT: -- I don't have much except  
20   that this same argument is made in every individual  
21   case where Equifax has for years until at least we  
22   started serving discovery requests and saying, Well,  
23   then give us the details as to why it takes so long  
24   and why it costs so much, and we've never heard this  
25   argument again until this case.

1           THE COURT: Well, I'm going to tell you have  
2 what we're going to have in this case, and that is if  
3 there's an issue respecting that it takes so much time  
4 and it costs so much money, we're going to have a  
5 detailed explanation of why that is so under oath in  
6 such a way as these people will take seriously what it  
7 is that they're doing in telling the Court that it  
8 takes time and it takes money.

9           I know it takes time. I know it takes money.  
10 The question is: How much of each? And it has been  
11 my experience that when people have to provide  
12 something that they are accountable for in court, the  
13 information becomes much more focused, the cost  
14 becomes less, and the time becomes less.

15           Equifax can either do it the easy way or the  
16 hard way. And it's going to be up to you, Mr. Love.  
17 I think you-all need to talk about this a little  
18 further, don't you?

19           MR. BENNETT: Yes, sir.

20           THE COURT: Given that this just came up.  
21 But just understand, Mr. Love, that whatever you say  
22 is the cost, whatever you say is the time, it's going  
23 to have to be backed up by somebody under oath with  
24 figures, and they can't have months or weeks to put it  
25 together. This is not a difficult process.

1 MR. LOVE: Yes, Your Honor. We will confer  
2 further with Mr. Bennett on this issue.

3 THE COURT: And if I get put to it, I'm just  
4 going to let Mr. Bennett hire an expert, and I'm going  
5 to require you to turn over the data and let the  
6 expert formulate the process to get it done simply and  
7 to save your client the money that it ought to be  
8 trying to save itself.

9 Mr. Bennett, you need to be reasonable in the  
10 search criteria as well.

11 MR. BENNETT: Yes, Your Honor.

12 THE COURT: And I expect you-all to talk  
13 about it. Also with this revision. I'd like to have  
14 another notice. I'd like to have all that by the end  
15 of next week. I'd like to have the plan for how we're  
16 going to do the class list and the notice by the end  
17 of next week. That would be Friday. On what day is  
18 that?

19 MR. GOHEEN: Friday the 13<sup>th</sup>, Your Honor.

20 THE COURT: That's a bad date.

21 MR. GOHEEN: Yeah, how about Saturday, the  
22 14<sup>th</sup>?

23 THE COURT: How about the 12th, Thursday the  
24 12? All right.

25 And I'm inclined that then we will have a

1 discovery schedule about the type that is outlined in  
2 the plaintiff's filing. Why do you need all these  
3 interrogatories and depositions, Mr. --

4 MR. BENNETT: Well, Judge, the  
5 interrogatories are because we're going to have to  
6 deal with a range of different issues that --  
7 liability, the reasonable procedures issues, the  
8 uniformity of those issues that the defendant  
9 continues to oppose, and then willfulness.

10 The interrogatories, we believe, Judge,  
11 provide a more effective tool to avoid, you know,  
12 often, I don't want to the say fishing expedition,  
13 although it's proper, but a wider net of deposition  
14 attempts. So the interrogatories, they're not  
15 terribly burdensome for -- this is a class action,  
16 it's been certified, that alleges a multimillion  
17 dollar exposure by the defendant, and for this  
18 defendant to have to answer 45 interrogatories is not  
19 unduly burdensome.

20 THE COURT: Mr. Goheen.

21 MR. GOHEEN: My proposal, Your Honor, would  
22 be why don't we go with the standard of 25 and 10, and  
23 if Mr. Bennett believes he needs more and can  
24 establish the standard for it, let's address it at  
25 that time, but I think a blank check for almost twice



1 the number of interrogatories, and then 50 percent  
2 more on depositions when there's already been an  
3 initial phase of discovery just seems, without any  
4 other basis, just seems improper at this point.

5 MR. BENNETT: Judge, there are already  
6 remedies under the federal rules if we ask  
7 interrogatories that are not reasonably calculated to  
8 advance the ball in this case, and we also have an  
9 obligation to continue to meet and confer. And to  
10 Equifax's credit, in discovery it does that. We do  
11 that. And so it's -- you don't give anybody a blank  
12 check to go off reservation on any of this stuff,  
13 Judge.

14 THE COURT: All right.

15 MR. GOHEEN: I take that back. You're right.  
16 I shouldn't have said it in that way. I apologize to  
17 you, Mr. Bennett, and to the Court, but my point was  
18 it seems, based only on what Mr. Bennett just said,  
19 and that's the only thing we've heard as to why he may  
20 need extra interrogatories, it just seems a little  
21 premature to allow that.

22 THE COURT: All right. I understand.

23 I think that in a case like this 45  
24 interrogatories and 15 depositions is not in concept  
25 unusual, nor is it burdensome, nor should it be

1 unexpected, but I also think this, that you're best  
2 able do that by receiving the 45 interrogatories and  
3 looking at the depositions that are proposed to be  
4 made, and then if there's a problem, you can bring it  
5 to me. And if they are overreaching, I'll deal with  
6 that. If they are not, Mr. Goheen, then you won't  
7 even be here at all. But the door will be open for  
8 you to address this in a more specific context.

9 MR. GOHEEN: Thank you, Your Honor.

10 THE COURT: Then you-all can work that out.

11 I think right now haven't we done about all  
12 we can do right now or is there anything else we need  
13 to do right now?

14 MR. BENNETT: I think that's all, Judge.

15 THE COURT: I will talk to you. I was  
16 proposing to set a trial date. I actually was  
17 proposing to set the trial date in either February or  
18 March, but I need to look at some other things that  
19 are developments that are happening on my docket in  
20 order to make a proposal, in other words, to talk to  
21 you all if it's going to be a week long case.

22 So the question is: Have you all talked  
23 about a trial date so I can take that into account in  
24 my planning as well?

25 MR. BENNETT: Your Honor, this is Leonard

1 Bennett. We've talked about a schedule that the  
2 parties have agreed to. We've not talked about a  
3 specific trial date, but we have talked about a  
4 schedule that would place this trial in that same time  
5 period.

6 I think the current proposal of the plaintiff  
7 was the discovery would end in December. We are not  
8 opposed to defendant's idea that before Your Honor  
9 sets a specific trial date that you have an  
10 opportunity to receive summary judgment motions from  
11 the parties and that the trial date would be set after  
12 that.

13 Our initial proposal conformed more to what  
14 the ordinary custom in this courthouse is, which is to  
15 set a trial date, and then track back from that for a  
16 dispositive motions deadline, but given the  
17 significance of the case, Judge, I don't believe the  
18 defendant's position is unreasonable, but certainly we  
19 would accommodate whichever the Court's preference  
20 would be.

21 THE COURT: What about the notice? Do we  
22 have to send out another notice of the trial date?

23 MR. BENNETT: No, sir. The proposed notice  
24 that we have says the trial date will occur on or  
25 after this particular date, but they're not obligated

1 to receive direct notice or mail notice of an exact  
2 trial date. And, in fact, Your Honor has discretion  
3 to move dates going in the future.

4 THE COURT: Yes. Well, I need to assess  
5 what's going on in some other cases that have some  
6 priority over yours, but I'm looking at either  
7 February or March and a pretrial conference ahead of  
8 that by about 30 days. So we'll see. I'll go from  
9 there. All right. And we'll decide. But I'll  
10 certainly talk with you-all before any trial date is  
11 set.

12 MR. BENNETT: Yes, sir.

13 MR. GOHEEN: Thank you, Your Honor.

14 THE COURT: All right. Anything else we need  
15 to deal with today? All right. Then we need to get  
16 back together then and see where we are as of May the  
17 12th. So you're going to have all that done by May  
18 the 13th?

19 MR. BENNETT: Yes, sir.

20 THE COURT: Why don't we have a report from  
21 you-all on May the 16th at 10 o'clock in the morning.  
22 Is that okay?

23 MR. GOHEEN: Did Your Honor say 10 o'clock in  
24 the morning?

25 THE COURT: Yes.

1 MR. GOHEEN: Yes, Your Honor.

2 THE COURT: And we may know by then what the  
3 Fourth Circuit's done, too. But if we don't, we're in  
4 a position that we can move forward.

5 It is not my belief that it's appropriate  
6 once the Fourth Circuit grants an appeal of this  
7 issue, if they do, to be proceeding with expensive  
8 discovery. So I'd like to see where we are and keep a  
9 close watch on this matter so we don't trench on what  
10 you-all are doing with the Court of Appeals or cost  
11 anybody any unnecessary money.

12 MR. GOHEEN: This is Barry Goheen. Will this  
13 also be a telephonic report on the 16th?

14 THE COURT: I think so. And I'll receive a  
15 status report on the afternoon of the 13th by fax.  
16 All right?

17 MR. BENNETT: Yes, sir.

18 THE COURT: All right. You can either file a  
19 joint one or you can each file your own.

20 Anything else that needs to be done,  
21 gentlemen? All right. Thank y'all a lot.

22 MR. BENNETT: Thank you.

23 THE COURT: Bye.

24

25 (The proceedings were adjourned at 2:43 p.m.)

1 I, Diane J. Daffron, certify that the  
2 foregoing is a true and accurate transcription of my  
3 stenographic notes.

4 /s/

5 \_\_\_\_\_  
6 DIANE J. DAFFRON, RPR, CCR

\_\_\_\_\_  
DATE